

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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ARCHER & GREINER,  
A Professional Corporation,

1:16-cv-04023-NLH-AMD

Plaintiff/Counter-  
defendant,

**OPINION**

v.

ALAN P. ROSEFIELD,

Defendant/Counter-  
claimant/Third-Party  
Plaintiff,

BENJAMIN MORGAN and JOHN  
CONNELL,

Third-Party  
Defendants.

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**APPEARANCES:**

ELLIS I. MEDOWAY  
THOMAS A. MUCCIFORI  
KERRI E. CHEWNING  
ARCHER & GREINER, PC  
ONE CENTENNIAL SQUARE  
HADDONFIELD, NJ 08033

On behalf of Plaintiff/Counter-defendant and Third-Party  
Defendants

ANDREW RUBIN  
96 PARK STREET  
MONTCLAIR, NJ 07042

On behalf of Defendant/Counter-claimant/Third-Party  
Plaintiff

**HILLMAN, District Judge**

This matter concerns claims by Plaintiff, Archer & Greiner,  
PC, against Defendant, Alan P. Rosefield, for unpaid legal

fees, and Rosefielde's counterclaims and third-party complaint against Archer & Greiner, PC and two of its lawyers, Benjamin Morgan and John Connell (collectively hereinafter "Archer"), for legal malpractice, breach of fiduciary duty, and breach of contract arising out of the representation of Rosefielde that resulted in the alleged unpaid legal fees. Archer has moved for judgment on the pleadings in its favor on Rosefielde's claims against it. For the reasons expressed below, Archer's motion will be granted in part and denied in part.

#### BACKGROUND

This action arises out of Archer's representation of Rosefielde in a dispute between Bruce Kaye, who managed several timeshare business entities, and Rosefielde, an attorney whom Kaye initially retained as outside counsel and later became in-house general counsel of Kaye's business entities and Kaye's personal attorney, as well as Chief Operating Officer of several of the timeshare entities.

The background for this "inordinately complicated" and "massive" case<sup>1</sup> was summarized by the N.J. Supreme Court when the dispute finally came before it on Kaye's petition for certification:

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<sup>1</sup> See Kaye v. Rosefielde, 75 A.3d 1168, 1172 (N.J. Super. Ct. App. Div. 2013) (Kaye II) (explaining that the case "has been besieged by an inordinate amount of complications" and has a "massive record").

For approximately two years, Rosefielde served as Chief Operating Officer (COO) of some of Kaye's timeshare businesses, and functioned, in effect, as those entities' General Counsel. In that capacity, Rosefielde committed serious misconduct by acting on his own behalf instead of acting for his employers' benefit and exposing his employers to potential liability. That misconduct, among other issues, led to Rosefielde's dismissal and this litigation.

Kaye, in his individual capacity and as trustee of two trusts, Kaye's son Jason Kaye, and business entities that Kaye owned sued Rosefielde and several entities.

Plaintiffs asserted claims based on Rosefielde's breach of fiduciary duty, fraud, legal malpractice, unlicensed practice of law, and breach of the duty of loyalty.

Following a lengthy bench trial, the trial court found that Rosefielde engaged in egregious conduct constituting a breach of his duty of loyalty, breach of his fiduciary duty, legal malpractice, and civil fraud. The trial court rescinded Rosefielde's interest in several entities, awarded compensatory damages, punitive damages, and legal fees, and dismissed Rosefielde's counterclaims. It declined, however, to order the equitable disgorgement of Rosefielde's salary as a remedy for his breach of the duty of loyalty, on the ground that his breach did not result in damage or loss to the entities that employed him. The Appellate Division affirmed that determination, and this Court granted certification on the issue of equitable disgorgement.

Kaye v. Rosefielde, 121 A.3d 862, 864 (N.J. 2015) (Kaye III).

The N.J. Supreme Court's opinion granting certification provided that "the petition for certification is granted limited to the issue of whether the Appellate Division erred by affirming the trial court's holding that economic damages are a necessary prerequisite for disgorgement of the employee's salary." Kaye v. Rosefielde, 91 A.3d 22 (N.J. 2014).

After considering that question, the N.J. Supreme Court

reversed the appellate division and held that "the remedy of equitable disgorgement is available to a trial court even absent a finding that the employer sustained economic loss by virtue of the employee's disloyal conduct. In accordance with the broad discretion afforded to courts fashioning equitable remedies that are fair and practical, a trial court may order disgorgement of an employee's compensation as a remedy for a breach of loyalty in an appropriate case."

Kaye III, 121 A.3d at 864-65.

In his claims against Archer, Rosefielde argues that the N.J. Supreme Court's certification of the disgorgement issue was flawed from the outset because Rosefielde was not an "employee." Because the N.J. Supreme Court based its holding on the assumption that Rosefielde was an employee rather than an independent contractor, which Rosefielde contends that he was and that Kaye also viewed him that way, the determination that he must be disgorged of his salary is incorrect. Rosefielde blames Archer for this incorrect court order because it failed to correct, in either its brief, at oral argument, or in a motion for reconsideration, the N.J. Supreme Court's mistaken assumption that Rosefielde was Kaye's employee.

Rosefielde also claims that Archer committed legal malpractice, breached its fiduciary duty to Rosefielde, and breached their contract in other ways: (1) failing to follow his

detailed request that the brief submitted to the N.J. Supreme Court explain that Rosefielde had entered into a settlement agreement regarding his and Kaye's Florida litigation, and that the appeal was the only outstanding dispute between him and Kaye; (2) failed to argue in the brief or at oral argument the doctrine of judicial estoppel - that Rosefielde could be considered an employee for the purposes of engorgement, but could not be considered an employee under New Jersey's Contentious Employee Protection Act; (3) billed excessively for its work, and billed for unnecessary work; and (4) by written agreement, Archer accepted a payment by Rosefielde of \$30,000 in full satisfaction of all amounts due and owing Archer as of September 26, 2013, but Archer is seeking payment for five bills that were invoiced prior to September 26, 2013.

Archer argues that it is entitled to judgment in its favor on Rosefielde's malpractice and breach of fiduciary claims because the N.J. Supreme Court's decision did not hinge on the settlement or Rosefielde's classification as an employee or independent contractor. Archer further argues that even if Archer erred in the ways Rosefielde contends, it had no impact on the N.J. Supreme Court's decision.

Archer also argues that contrary to Rosefielde's allegations, it pointed out to the court in several of its briefs that the lower courts did not classify Rosefielde as an employee

and that Rosefielde had settled the litigation with Kaye. Archer further argues that Rosefielde's breach of contract claims are either a repackaging of his malpractice claims or are simply affirmative defenses to Archer's claims against him.

## DISCUSSION

### **A. Subject matter jurisdiction**

Defendant removed this action from New Jersey state court to this Court pursuant to 28 U.S.C. § 1441. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000. The citizenship of the parties is as follows: Plaintiff is a professional corporation organized under the laws of New Jersey with its principal place of business in Haddonfield, New Jersey<sup>2</sup>;

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<sup>2</sup> Even though the Third Circuit has not specifically held that a professional corporation should be treated as a traditional corporation, see Lincoln Ben. Life Co. v. AEI Life, LLC, 800 F.3d 99, 113 (3d Cir. 2015) (citing Wright, Miller, et al., 13F Fed. Prac. & Proc. § 3630.1 (3d ed. 2015)) (explaining that "some circuits treat professional corporations, which function much like LLCs, as traditional corporations"), several circuits have come to that conclusion, see Kuntz v. Lamar Corp., 385 F.3d 1177, 1182-83 (9th Cir. 2004) (citation omitted) (holding that a professional corporation should be treated like a regular corporation for citizenship purposes, explaining that the Seventh and Second Circuits have similarly held, and quoting Judge Posner, paraphrasing Gertrude Stein, "for purposes of diversity jurisdiction, a corporation is a corporation is a corporation"). Because New Jersey appears to treat a professional corporation the same as a traditional corporation, this Court finds that the citizenship of a New Jersey professional corporation is the same as a traditional

Defendant is a citizen of Florida.<sup>3</sup>

#### **B. Standard for Judgment on the Pleadings**

A Rule 12(c) motion for judgment on the pleadings may be filed after the pleadings are closed. Fed. R. Civ. P. 12(c); Turbe v. Gov't of V.I., 938 F.2d 427, 428 (3d Cir. 1991). In analyzing a Rule 12(c) motion, a court applies the same legal standards as applicable to a motion filed pursuant to Rule 12(b)(6). Turbe, 938 F.2d at 428. Thus, a court must accept

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corporation under 28 U.S.C. § 1332(c)(1). See N.J.S.A. 14A:17-5(a) ("One or more persons, each of whom is duly licensed or otherwise legally authorized to render the same or closely allied professional service within this State, may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under the provisions of the Business Corporation Act of New Jersey (Title 14A, Corporations, General, of the New Jersey Statutes), for the sole and specific purpose of rendering such professional service."); N.J.S.A. 14A:17-13(a) ("A professional corporation shall have perpetual existence until dissolved in accordance with the provisions of the Business Corporation Act of New Jersey."); see also <http://www.nj.gov/njbusiness/starting/basics/>.

<sup>3</sup> The citizenship of third-party defendants - here, Benjamin Morgan and John Connell - is not considered in the Court's subject matter jurisdiction analysis. New Hampshire Ins. Co. v. Diller, 678 F. Supp. 2d 288, 292 n.2 (D.N.J. 2009) (citing Spring City Corp. v. American Bldgs. Co., 193 F.3d 165, 169 (3d Cir. 1999) (stating that "a third-party defendant joined under Federal Rule of Civil Procedure 14 does not become a defendant as against the original plaintiff, so that federal jurisdiction is not destroyed where those parties are citizens of the same state") (citing Smith v. Philadelphia Transp. Co., 173 F.2d 721, 724 n.2 (3d Cir. 1949)); In re Albert & Maguire Securities Co., Inc., 70 F.R.D. 361, 363 (E.D. Pa. 1976) ("Under Fed. R. Civ. P. 14, it is not required that diversity of citizenship exist between the third-party defendant and the plaintiff, or that diversity of citizenship exist between defendant, as third-party plaintiff, and the third-party defendant.")).

all well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. Evanko v. Fisher, 423 F.3d 347, 351 (3d Cir. 2005).

A district court, in weighing a motion to dismiss, asks "'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim.'" Bell Atlantic v. Twombly, 127 S. Ct. 1955, 1969 n.8 (2007) (quoting Scheuer v. Rhoades, 416 U.S. 232, 236 (1974)); see also Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (stating that the "Supreme Court's Twombly formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element"). A court need not credit either "bald assertions" or "legal conclusions" in a complaint when deciding a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997). The defendant bears the burden of showing that no claim has been presented. Hedges v. U.S., 404 F.3d 744, 750 (3d Cir. 2005) (citing Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991)).

### C. Analysis

#### 1. *The N.J. Supreme Court's assumption that Rosefielde was an "employee"*

Rosefielde claims that Archer failed to follow his detailed request that Archer argue in the brief and at oral argument that the appellate division had determined that Rosefielde was not an employee but rather an independent contractor, and even that Kaye referred to Rosefielde as an independent contractor.

Rosefielde argues that this was crucial because the N.J. Supreme Court's certification of the sole question on appeal erroneously assumed Rosefielde's status as an "employee." Rosefielde also claims that Archer failed to argue in the brief or at oral argument the doctrine of judicial estoppel, where Rosefielde should not be considered an employee for the purposes of engorgement, since he was not considered an employee under NJ CEPA. Rosefielde also claims that Archer failed to file a motion for reconsideration on this issue after the N.J. Supreme Court issued its decision.

In setting forth the relevant background facts, the N.J. Supreme Court noted:

The salary was characterized as a "retainer" on monthly invoices submitted by Rosefielde. The parties agreed that Rosefielde would work autonomously and that he would not be required to report to a superior. Although the terms of the business arrangement suggest an intent that Rosefielde function as an independent contractor, and the record suggests that it was anticipated early in the relationship that Rosefielde would serve in that capacity, the parties

agree that he was an employee of the entities for which he served as COO and provided legal services. We thus address the issue before us on the assumption that Rosefielde was an employee.

Kaye III, 121 A.3d at 865 n.2.

Rosefielde argues that this incorrect assumption, left unchallenged and uncorrected by Archer, resulted in the improper disgorgement of his wages, and constitutes legal malpractice, breach of fiduciary duty, and breach of contract.

The elements of a legal malpractice claim "are (1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.'" Granata v. Broderick, 143 A.3d 309, 321 (N.J. Super Ct. App. Div. 2016) (quoting McGrogan v. Till, 167 N.J. 414, 425, 771 A.2d 1187 (2001)). In order to state a claim for breach of fiduciary duty, a plaintiff must allege: (1) the existence of a fiduciary relationship, (2) a breach of the duty imposed by that relationship, and (3) harm to the plaintiff. McMullen v. Ocwen Loan Servicing, LLC, 2017 WL 714347, at \*4 (D.N.J. 2017) (citing F.G. v. MacDonell, 150 N.J. 550, 561-64, 696 A.2d 697 (1997)) (other citation omitted). "To prevail on a breach of contract claim under New Jersey law, a plaintiff must establish three elements: (1) the existence of a valid contract between the parties; (2) failure of the defendant

to perform its obligations under the contract; and (3) a causal relationship between the breach and the plaintiff's alleged damages." Id. (citations omitted).

Archer is entitled to judgment in its favor on all three legal theories for Rosefielde's claims regarding his classification by the N.J. Supreme Court as an "employee." First, contrary to Rosefielde's claims, Archer filed an opposition and cross-motion relating to Kaye's motion to expand the certified question to the N.J. Supreme Court, and in that filing, Archer succinctly notes: "The assertion that Rosefielde was an employee contradicts the trial court's finding that Rosefielde did not qualify for employee status as affirmed by the appellate panel." (Docket No. 23-1 at 9.) This alone defeats all of Rosefielde's claims on this issue.

Second, this Court agrees with Archer that the N.J. Supreme Court's decision does not hinge on Rosefielde's status as an employee, independent contractor, or any other descriptive name for his role in Kaye's entities. Under the long-established premise that the "disgorgement remedy is consonant with the purpose of a breach of the duty of loyalty claim," the N.J. Supreme Court considered whether that remedy is available when a plaintiff cannot show economic loss. Kaye III, 121 A.3d at 873. In holding that it is, the court adopted "the view of disgorgement as a remedy for the breach of an employee's duty of

loyalty stated by comment a to section 469 of the Restatement (Second) and comment d(2) to section 8.01 of the Restatement (Third)." Id. at 873-74. Comment a provides that "a disloyal agent is not entitled to compensation, even though the conduct of the agent does not harm the principal." Id. at 872 (citations omitted). Comment d(2) provides that "[t]he better rule does not condition the availability of forfeiture as a remedy on whether a principal can establish damage." Id. (citations omitted).

By way of an example for its holding, one of the cases discussed by the N.J. Supreme Court is County of Essex v. First Union Nat. Bank, 891 A.2d 600 (N.J. 2006). That case concerned a county government's claim for the disgorgement of fees earned by a bank that obtained its position as a bond underwriter through bribery perpetrated by the bank's senior vice-president. Id. at 873 (discussing First Union, 891 A.2d at 607). "There, although the county acknowledged that it did not suffer damages on certain bond transactions, the Court explained that 'unjust enrichment/disgorgement is an equitable claim ... grounded in the theory that a wrongdoer should not profit from its wrongdoing regardless of whether the innocent party suffered any damages.'" Id. (quoting First Union, 891 A.2d at 607) (further explaining, "It is the evil of the wrongdoer retaining any of the fruits of its wrongful conduct that grounds the claim.").

When specifically applying the principles of duty of loyalty and disgorgement to Rosefielde, the N.J. Supreme Court found that "the trial court's thorough factual findings provide substantial information about the timing of Rosefielde's disloyal acts and the frequency and amount of his compensation. Rosefielde, through his company Plumrose, was paid his \$500,000 annual salary on a monthly basis, in equal shares by Flagship and Atlantic Palace." Kaye III, 121 A.3d at 874. In directing the trial court, on remand, that it should apportion Rosefielde's compensation and order disgorgement only for monthly pay periods in which he committed acts of disloyalty, the court quoted Simulation Systems Technologies, Inc. v. Oldham, 634 A.2d 1034, 1036 (N.J. Super. Ct. App. Div. 1993), which in turn quoted Restatement (Second) § 456 comment b: "A serious violation of a duty of loyalty or seriously disobedient conduct is a wilful and deliberate breach of the contract of service by the agent, and, in accordance with the rule stated in Section 456, the agent thereby loses his right to obtain compensation for prior services, compensation for which has not been apportioned." Id. 874-75.

Thus, even though the N.J. Supreme Court referred to Kaye as an "employer" and Rosefielde as an "employee," a claim based on a breach of the duty of loyalty arises from the concept of agent and principal, as provided by the Restatement, and

warrants the equitable remedy of disgorgement even when the principal as not suffered economic loss. It is indisputable that Rosefielde acted as Kaye's agent in some form, whatever that form may be called. Contrary to Rosefielde's arguments here, the N.J. Supreme Court's decision in Kaye III depended on Rosefielde's status as Kaye's agent, rather than Rosefielde's classification as an "employee."

Finally, Rosefielde's argument about Archer's failure to raise the principle of judicial estoppel to support his malpractice, breach of fiduciary duty, and breach of contract claims is without merit. As a primary matter, in support of Rosefielde's claim under New Jersey's Contentious Employee Protection Act, Rosefielde asserted that "despite his status as COO and general counsel, he functioned as Kaye's employee." Kaye II, 75 A.3d at 1193. The appellate division noted that NJ CEPA "defines 'employee' as 'any individual who performs services for and under the control and direction of an employer for wages or other remuneration,'" id. at 1193 n.17 (quoting N.J.S.A. 34:19-2(b)), and affirmed the trial court's determination that Rosefielde did not qualify for employee status under NJ CEPA, id. at 1213.

That the lower courts did not find Rosefielde to be an "employee" as defined by NJ CEPA has no import, however, on how Rosefielde is classified in the breach of the duty of loyalty

context. How a person's status is defined by a statute does not assume the same status under a different statute or common law.

See, e.g., Nu-Look Design, Inc. v. C.I.R., 356 F.3d 290, 293 (3d Cir. 2004) (finding that a corporate officer was an employee for purposes of FICA and FUTA, and therefore required to pay certain taxes, and rejecting the corporate officer's argument that he would not be considered an employee under the common law and therefore not required to pay those taxes); LM Insurance Corporation v. Kobys, 2017 WL 1073352, at \*13 (D.N.J. 2017) (explaining that the definition of employee is different under the Federal Motor Carrier Safety Administration regulations, New Jersey Unemployment Compensation law, New Jersey Worker's Compensation law, and the common law); see also In re M.L., 2012 WL 385407, at \*4 (N.J. Super. Ct. App. Div. 2012) (citations and quotations omitted) ("When examining the plain language of the statute, we assign common law definitions of otherwise undefined statutory terms. We will not add an additional qualification which the Legislature pointedly omitted in drafting its own enactment, or engage in conjecture or surmise which will circumvent the plain meaning of the act. Our duty is to construe and apply the statute as enacted.").

In sum, Rosefielde's claims relating to the N.J. Supreme Court's classification of Rosefielde as an "employee" fail for three reasons: (1) Archer informed the court that the lower

courts did not find Rosefielde to be an "employee"; (2) the N.J. Supreme Court's decision in Kaye III did not hinge on Rosefielde's status as an employee, but rather on his status as Kaye's agent; and (3) Rosefielde's not being an employee under NJ CEPA has no bearing on his classification in a claim for the breach of the duty of loyalty. Consequently, Archer is entitled to judgment in its favor on Rosefielde's malpractice, breach of fiduciary duty, and breach of contract claims arising out of Kaye III.<sup>4</sup>

**2. *Rosefielde's claim regarding the settlement agreement***

Rosefielde claims that Archer committed legal malpractice and breached its fiduciary duty and their contract by failing to follow his detailed request that the brief submitted to the N.J. Supreme Court explain that Rosefielde had entered into a settlement agreement regarding his and Kaye's Florida litigation, and that the appeal was the only outstanding dispute between him and Kaye.

This claim fails because Archer informed the N.J. Supreme Court in at least three court filings of the settlement. Archer

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<sup>4</sup> The foregoing analysis also supports the finding that Rosefielde's claim that Archer committed malpractice and breached its fiduciary duty and the parties' contract because it failed to file a motion for reconsideration of the N.J. Supreme Court's decision is also without merit. Archer is entitled to judgment in its favor on this basis as well.

filed a motion to dismiss the certification as barred by a settlement agreement between the parties, or in the alternative, stay the matter pending a decision by the Florida courts regarding the settlement agreement. (See Docket No. 21 at 20.) In a subsequent brief filed in opposition to Kaye's petition brief, which changed the noticed grounds for certification, Archer again argued that Kaye's petition should be dismissed because of the settlement agreement. (See id.) In another brief filed in opposition to Kaye's motion to expand the certification, Archer yet again informed the court of the parties' settlement agreement. (Docket No. 23-1 at 9.) That the N.J. Supreme Court did not find the settlement issue to be dispositive to Kaye's appeal or to the disgorgement issue does not impose liability onto Archer for malpractice or breach of fiduciary duty or contract. Archer's motion for judgment in its favor on this basis must be granted.

**3. *Rosefielde's claims regarding Archer's alleged excessive and unnecessary billing***

Rosefielde claims that Archer engaged in unnecessary and excessive billing. Rosefielde also claims that Archer breached the parties' September 26, 2013 agreement that settled all outstanding legal bills when it filed the instant suit against Rosefielde to collect on five bills that were invoiced prior to September 26, 2013. Archer argues that all of Rosefielde's

counterclaims regarding Archer's legal fees are affirmative defenses to its claims against Rosefielde to collect on those bills rather than actionable counterclaims.

The Court agrees that Rosefielde's allegations regarding Archer's legal bills are similar to Rosefielde's defenses to Archer's claims against him. See Modern Creative Services, Inc. v. Dell Inc., 2008 WL 305747, at \*2 (D.N.J. 2008) (quoting Black's Law Dictionary 451 (8th ed. 2004)) ("An affirmative defense generally constitutes a 'defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.'"). Indeed, Rosefielde's affirmative defenses encompass all of his allegations in his counterclaims: waiver, laches, estoppel, unclean hands, accord and satisfaction, and unjust enrichment. (See Docket No. 7 at 4.)

This does not mean, however, that Rosefielde cannot assert counterclaims on the same bases as his affirmative defenses. For example, Rosefielde claims that Archer breached the parties' September 26, 2013 settlement agreement by seeking payment for invoices #1403020 dated 11/16/11, #1408540 dated 12/12/11, #1436955 dated 05/09/12, #1455322 dated 08/08/12, and #1212890 dated 08/07/08, which were all invoiced prior to September 26, 2013, and thus have been fully satisfied. (Docket No. 7 at 21.) Even though Rosefielde's affirmative defense of accord and

satisfaction may be a defense to liability on Archer's claims against Rosefielde for payment of those five bills, such defense does not prevent Rosefielde from asserting his own breach of contract claim against Archer for Archer's liability for breaching the parties' contract. See Fed. R. Civ. P. 13(a) ("A pleading must state as a counterclaim any claim that - at the time of its service - the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction."); Master Cutlery, Inc. v. Panther Trading Co., Inc., 2013 WL 4517860, at \*3 (D.N.J. 2013) (denying the plaintiff's motion to dismiss the defendant's counterclaims on the basis that the counterclaims were really affirmative defenses, and noting that the plaintiff did not "cite any legal authority suggesting that an affirmative defense cannot be premised on the same legal theory as a counterclaim, and this Court is aware of none").

This also holds true for Rosefielde's claims for malpractice and breach of fiduciary duty relating to Archer's alleged improper billing. In general, counterclaims against law firms seeking to collect on outstanding bills are not dismissible merely because they are duplicative of the clients' affirmative defenses. See e.g., Hill Wallack v. Saint Gerard

Jordan, 2011 WL 2636986, at \*1 (N.J. Super. Ct. App. Div. 2011) ("Plaintiff Hill Wallack, LLP, sued defendant, Jackie Saint Gerard Jordan, seeking unpaid legal fees in excess of \$88,000 associated with its representation of defendant in a divorce action. Defendant filed a separate complaint against plaintiff, alleging legal malpractice on grounds that plaintiff unnecessarily prolonged the litigation, resulting in excessive billing. Thereafter, the cases were consolidated upon consent."); Szaferman, Lakind, Blumstein, Blader & Lehmann, P.C. v. Parise, 2010 WL 624084, at \*1 (N.J. Super. Ct. App. Div. 2010) (plaintiff law firm sued its clients for outstanding legal fees, and clients counterclaimed alleging legal malpractice and fraud); Safier v. Walder, Sondak & Brogan, P.C., 2007 WL 1790707, at \*1 (N.J. Super. Ct. App. Div. 2007) (plaintiff law firm sued its client for legal fees, and client counterclaimed for billing fraud, unjust enrichment, and breach of contract)).

Because Archer has not argued that Rosefielde's claims based on his allegations of Archer's improper billing are deficient on any other basis than being duplicative of his affirmative defenses, those claims survive Archer's instant motion.

#### CONCLUSION

Archer is entitled to judgment in its favor on Rosefielde's counterclaims/third-party claims arising out of the N.J. Supreme

Court's decision in Kaye III. Archer is not entitled to judgment on Rosefielde's counterclaims/third-party claims relating to Archer's legal fees. An appropriate Order will be entered.

Date: June 12, 2017  
At Camden, New Jersey

s/ Noel L. Hillman  
NOEL L. HILLMAN, U.S.D.J.